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MAR 3 1961
JAMES R. BROWNING, Clerk

No. 558

In the Supreme Court of the United States

OCTOBER TERM, 1960

SAMUEL G. JONES, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 1a–4a) is reported at 282 F. 2d 745.

JURISDICTION

The judgment of the Court of Appeals was entered on October 10, 1960. (Pet. 1a.) The petitioner was granted an extension of time in which to file his petition for certiorari until December 4, 1960. (Pet. 1.) The petition was filed on December 1, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied a fair trial on a charge of tax evasion where the government's computation of corporate tax deficiencies included non-fraudulent adjustments and the trial judge specifically instructed the jury that the government had not contended that these adjustments "were in any sense criminal in nature."

2. Whether the trial judge's other rulings and conduct of the trial deprived petitioner of a fair trial.

STATUTES AND RULES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145.)

Internal Revenue Code of 1954:

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(26 U.S.C. 7201.)

Federal Rules of Criminal Procedure:

RULE 30.

INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

RULE 52.

HARMLESS ERROR AND PLAIN ERROR

* * * * *

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

Petitioner was indicted in the United States District Court for the Eastern District of Virginia for a willful attempt to evade his individual income taxes (Counts I, III, V) and the corporate income taxes of the Berkley Machine Works and Foundry Company, of which he was president and principal stockholder (Counts II, IV, VI), for the years 1952, 1953, and 1954, in violation of Section 145(b) of the Internal Revenue Code of 1939 and Section 7201 of the Internal Revenue Code of 1954, *supra*, pp. 2–3. (I R. 3–7.)[1]

The evidence adduced at the ten-day trial before a jury demonstrated that petitioner had used corporate funds for the following purposes: to construct two residences in North Carolina (Samjo Manor and the Austin House) at a cost of $34,686.28 for labor and $55,772.39 for materials, or a total of $90,458.67 (II R. 388–405, 423–424, 458); to maintain in large measure his own rural 290-acre homeplace (Sajo Farms)

[1] "I R." refers to the "Appellant's Appendix" in the court of appeals below; "II R." refers to the "Appendix for Appellee"; "Tr." preceded by a volume number refers to the seven volumes of the reporter's typewritten transcript of the trial, on file with this Court.

(II R. 303–330); and to pay for such personal items as rent on his sister's apartment, tailor-made suits and haberdashery, and personal household articles (II R. 20–33, 168–169, 331–344). At petitioner's direction (II R. 176, 195–196, 213; III Tr. 770–771), and following his alteration of some of the corporate records (II R. 267–272, 398–403, 503–508), the foregoing personal expenditures were charged to corporate expense accounts for "freight", "foundry" repairs, and "sales promotion" (II R. 303–357) or disguised as costs of Berkley Manor, a corporate property (II R. 195, 391–406).[2] All of these alleged corporate expenditures were expensed on the corporation's books and deducted in computing its income tax obligations for 1952, 1953, and 1954 (Pet. 1a–2a); none of the amounts disbursed for petitioner's own personal benefit was included as income on petitioner's own personal returns (II R. 302, 450–469).[3]

Petitioner was found guilty, and a judgment of conviction was entered against him on June 8, 1959. He was sentenced to concurrent terms of five years on each count and an aggregate fine of $30,000. The

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[2] As noted by the Court of Appeals (Pet. 2a), "The construction and operation of a third residence [other than Samjo Manor and the Austin House], which the Government conceded on the trial was used for corporate purposes, and the purchase of certain machinery and capital assets for the corporation had been expensed on the corporate books and deducted in computing corporate income tax liabilities. The deduction of such capital items the Government conceded was not fraudulent, but their capitalization resulted in adjustments which made a substantial contribution to the overall deficiencies shown in computations which were offered in evidence by the prosecution and received without objection."

[3] The government's computation at the trial showed the fol-

court reserved authority to modify the sentence or grant probation within a six-month period after study by the Bureau of Prisons. (Pet. 5a–6a.)

The Court of Appeals affirmed the judgment of conviction, finding "no error affecting substantial rights of the defendant." (Pet. 4a.)

ARGUMENT

1. Petitioner's chief complaint is that the government's computations of corporate income tax deficiencies reflected the capitalization of items which had been originally expensed (Pet. 20–22) and which were concededly non-fraudulent (Pet. 2a). But the government was required to present the computations in the form they were offered in order to disentangle the financial picture of the corporation from that of petitioner and to show the correct corporate income and tax. Moreover, these computations were not prejudicial to petitioner.

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lowing amounts of reported and corrected net income and tax liability (II R. 432–460, 563, 565):

Count	Year	Reported		Corrected	
		Income	Tax	Income	Tax
Individual:					
I	1952	$15,651.61	$3,661.56	$26,124.42	$7,747.72
III	1953	15,999.74	3,779.92	24,232.69	6,933.74
V	1954	12,946.73	2,498.20	119,372.46	66,819.34
Corporation:					
II	1952	4,410.94	1,323.28	52,048.17	22,904.23
IV	1953	29,818.16	10,005.44	74,415.13	40,836.41
VI	1954	29,527.35	9,854.22	68,342.93	30,038.32

The foregoing figures include non-fraud adjustments with respect to the corporation's "corrected" figures.

The trial court explicitly admonished the jury—not only when the computations were admitted but twice in the final instructions—that the government did not contend that the expensing of the ultimately capitalized items involved "any suggestion or intimation that that was any criminal act on the part of the defendant" (II R. 358-359, 367) or "were in any sense criminal in nature" (I R. 293, 297). Petitioner's counsel himself referred to the items as having "no bearing, as the Court has told the jury, on the criminal intent, but only as it affected an understatement of taxes, of income" (I R. 129.) Contrary to petitioner's assertion (Pet. 21) that the Court of Appeals concluded, in effect, that "there could be no willful evasion unless the non-fraudulent income was employed in computing the deficiencies," the fact is that the court below, in a portion of the opinion which petitioner fails to quote, stated that the government's proof of corporate disbursements for petitioner's personal purposes—exceeding $10,000 in each of the years 1952 and 1953, and $108,000 in 1954—"clearly did contribute to the corporate deficiencies" and that "the fairness of the trial was not impaired by the absence of a mathematical computation showing the relative contribution of each type of adjustment, a computation which the defendant during the trial *neither offered nor requested*" (Pet. 3a (emphasis added)).*

* The court also pointed out that "[i]f the defendant had wished at the time of the trial, he could have introduced a computation which would have shown exactly what contribution to the overall deficiencies had been made by the transactions which the prosecution claimed to have been fraudulent and by those transactions as to which the prosecution made no such claim. When the defendant at the trial undertook to offer no such

This holding by the Court of Appeals was consonant with the rule of law in such cases that "[i]t is not necessary to prove that there was a particular amount of tax evaded nor need the computations be exact in an accounting sense." *United States* v. *Nunan*, 236 F. 2d 576, 586 (C.A. 2d), certiorari denied, 353 U.S. 912; accord, *United States* v. *Johnson*, 319 U.S. 503, 517.

2. Petitioner's objections to the District Court's conduct of the case are not well grounded and provide no basis for petitioner's assertion that he was denied a fair trial.

(*a*) The trial court's statement that "[w]e, of course, are not dealing in this case with peanuts" was intended to inform the jury that a prerequisite to conviction on the offenses charged was the understatement of a *substantial* amount of income. (I R. 167.) Petitioner's counsel did not object to the court's explanation; on the contrary, satisfied that the allegedly derogatory term was used in the context of a proper and necessary explanation as to what constituted a substantial understatement of income, counsel advised the court: "All right, we will forget about it." (I R. 167–168.) Nor did counsel take any exception to the trial court's comprehensive final instruction concerning the meaning of the term "substantial." (I R. 288–289.)

Similarly, the trial judge's warning to petitioner that "you are not above the law" (II R. 502) was an

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computation, and failed to request one of the prosecution, he is hardly in a position now, on appeal, to complain that the prosecution did not show with mathematical precision the tax consequence of what was generally and clearly explained to the jury." (Pet. 2a–3a.)

appropriate observation when considered in context. The record shows that petitioner, instead of answering questions, insisted upon questioning the questioner (II R. 475, 484, 489, 494, 521); volunteered criticisms (II R. 479, 482, 483, 495, 531); repeatedly castigated the prosecutor (II R. 478, 489, 517, 522, 532, 543); and proved himself to be difficult even to his own counsel (I R. 188, 192, 204, 209, 211–212, 216; see II R. 473, 520, 531–533). Consequently, the trial judge felt constrained to admonish petitioner repeatedly (I R. 175, 205; II R. 478, 489, 517, 522, 525, 533); even petitioner's own counsel was forced to request him to "just answer the question" on many occasions during his own examination of petitioner (I R. 176, 181, 195) and during cross-examination (II R. 517, 524, 527, 528). Ultimately, the trial judge was forced to warn petitioner, out of the presence of the jury, that if petitioner persisted in his demeanor he would be held in contempt. (II R. 534.) Under the circumstances, the trial court's advice to petitioner that he was "not above the law" was certainly appropriate. Indeed, even petitioner admits that the warning was provoked because he had responded to questions "in an imprudent manner." (Pet. 24.)

(*b*) If petitioner suffered "public ridicule," as he contends (Pet. 11, 24–25), because of the publicity attending certain matters arising out of his trial, the short answer is that they were matters of his own doing. Thus, the reference to the use of corporate funds to purchase suppositories for his own use was a necessary, albeit small, part of the government's evidence showing that corporate funds had been improperly

expended to procure for petitioner many items of a personal nature, including salad plates, lamp shades, a tea and coffee service, a food mixer, juice extractors, wine glasses, an outdoor grill, an R.F.D. mailbox, shoes, horseback riding accessories, an oil painting, diamonds and rubies used in remodeling jewelry, sport coats, tailor-made suits, and haberdashery. (II R. 331–344.) Similarly, if it embarrassed petitioner to have factual newspaper reports of the criticism leveled at him by the trial court—outside the presence of the jury—for using the word "nigger" (a member of the Negro race had been on the jury (I R. 215)), that, too, was a matter of his own doing. The Court of Appeals was therefore correct in refusing to permit petitioner to raise the charges of ridicule as a basis for reversible error.

(c) Finally, prejudicial error cannot be premised upon isolated words and phrases of the trial court's instructions (see Pet. 17–19) or upon its failure to instruct where no instructions had been requested and none needed (see Pet. 25). Petitioner misreads the instructions that were given; in context, they constitute a full statement of the basic and required directions in a tax evasion case. Counsel made no objection to them at the trial[5] (VII Tr. 1714), as he was required to do by Rule 30, F.R. Crim. P., *supra,* p. 3. Nor are the matters complained of here "[p]lain errors * * * affecting substantial rights," for which no objection is needed to be noticed by the court (Rule

[5] Petitioner's single exception to the instructions was with respect to an issue not urged in his petition. (VII Tr. 1714.)

52(b), F.R. Crim. P., *supra*, p. 4), rather, they indicate nothing more than a belated quest for error in a ten-day trial which was carefully conducted.*

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MARCH 1961.

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* Petitioner also complains about several rulings on the admission of evidence. Thus, he complains (Pet. 11) of admission, under the "shop book rule," of the "Bride's Book," establishing receipt by petitioner's niece of wedding gifts from petitioner which had been paid for by the corporation. This admission could not have prejudiced petitioner's case, since petitioner admitted these same facts. (II R. 512–513.) Moreover, it was petitioner's own counsel who had requested that the book be produced as "the best evidence". (II Tr. 339.) Similarly, there is no merit to petitioner's complaint (Pet. 3, 11–12) respecting the use of an agent's notes to refresh a witness' recollection, since it is an elementary principle that anything which will serve to revive a memory can be used for that purpose. *United States* v. *Riccardi*, 174 F. 2d 883, 888 (C.A. 3d), certiorari denied, 337 U.S. 941. Finally, there is no merit to petitioner's further complaint (Pet. 3, 12) respecting testimony on rebuttal about a 1957 conversation (I R. 280). This testimony was clearly admissible on the issue of credibility, since petitioner, while testifying, had categorically denied that such a conversation had taken place. (II R. 530–532.)

U. S. GOVERNMENT PRINTING OFFICE: 1961